Before the Federal Communications Commission
Washington, D.C. 20554

In the Matter of	
Review of the Section 251 Unbundling) Obligations of Incumbent Local Exchange) Carriers)	CC Docket No. 01-338
Implementation of the Local Competition) Provisions of the Telecommunications Act of) 1996)	CC Docket No. 96-98
Deployment of Wireline Services Offering) Advanced Telecommunications Capability)	CC Docket No. 98-147

Reply Comments of the Minnesota Department of Commerce

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I. INTRODUCTION

The Minnesota Department of Commerce ("MDOC") respectfully submits these comments in reply to comments made by various parties with respect to the FCC's Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers Notice of Proposed Rulemaking.

The MDOC is the state executive branch agency charged with advocating the public interest before federal and state legislative and regulatory authorities, including the FCC and the Minnesota Public Utilities Commission (MPUC).[1]

The FCC has predictably been inundated with a barrage of comments, *ex parte* presentations, letters, statistics, opinions, affidavits, declarations, and "fact reports" by the multitude of parties whose interests are impacted by the prospect of FCC action outlined in its NPRM. The snowstorm of information that has descended on the FCC achieves blizzard proportions (even in Minnesota) when the spin accompanying the barrage is factored in. To make matters even more complicated, the FCC is faced with the reversal of its *UNE Remand Order*[2] establishing a list of unbundled network elements.[3]

In Minnesota, we're still trying to dig out of the initial blizzard created by the Telecommunications Act of 1996 – a storm that included a flurry of lawsuits and regulatory proceedings, both at the state and federal level. [4] That storm included three trips to the United States Supreme

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[1] Minn. Stat. Section 216A.07 (2001).

[2] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999).

[3] *United States Telephone Ass'n v. FCC*, Case No. 01-1085 (D.C. Cir July 16, 2002).

[4] See *U S WEST v. Minnesota Public Utilities Commission*, Case No. 97-913 (D. Minn. March 31, 1999); *AT&T v. U S WEST*, Case No. 97-CV-917 (D. Minn. March 31, 1999); *MCI Telecommunications Corp. v. U S WEST*, Case No. 97-CV-919 (D. Minn. March 31, 1999); *U S WEST v. Minnesota Public Utilities Commission*, Case No. 97-CV-1921 (D. Minn. March 31, 1999); *U S WEST v. Minnesota Public Utilities Commission*, Case No. 97-CV-1963 (D. Minn. March 31, 1999); *U S WEST v. Minnesota Public Utilities Commission*, Case No. 97-CV-2179 (D. Minn. March 31, 1999); *U S WEST v. Minnesota Public Utilities Commission*, Case No. 98-914 (D. Minn. March 31,

Court for interpretation of fundamental provisions of the Telecommunications Act of 1996, fierce fights at the state level regarding the pricing of unbundled network elements, line sharing obligations, terms and conditions of interconnection, wholesale service quality, and complaints of anti-competitive conduct.

1999); *U S WEST v. Minnesota Public Utilities Commission*, Case No. 98-1295 (D. Minn. March 31, 1999); ORDER AFTER REMAND, In re Federal Court Remand of Issues Proceeding from the Interconnection Agreements Between U S WEST Communications, Inc., and AT&T, MCI, MFS, and AT&T Wireless, Docket No. P-421/CI-99-786 (March 14, 2000); ORDER ON RECONSIDERATION, In re Federal Court Remand of Issues Proceeding from the Interconnection Agreements Between U S WEST Communications, Inc., and AT&T, MCI, MFS, and AT&T Wireless, Docket No. P-421/CI-99-786 (June 19, 2000); ORDER ACCEPTING AND MODIFYING PROPOSED CONTRACT LANGUAGE, In re Federal Court Remand of Issues Proceeding from the Interconnection Agreements Between U S WEST Communications, Inc., and AT&T, MCI, MFS, and AT&T Wireless, Docket No. P-421/CI-99-786 (September 20, 2000); SECOND ORDER ON RECONSIDERATION, DENYING RELIEF, In re Federal Court Remand of Issues Proceeding from the Interconnection Agreements Between U S WEST Communications, Inc., and AT&T, MCI, MFS, and AT&T Wireless, Docket No. P-421/CI-99-786 (December 6, 2001); ORDER GRANTING RECONSIDERATION, SETTING PRICES AND OREDERING COMPLIANCE FILING, In re Generic Investigation of U S WEST Communications, Inc.'s Cost of Providing Interconnection and Unbundled Network Elements, Docket No. P-442 et al/CI-96-1540 (March 15, 2000); FINAL ARBITRATION ORDER UNDER MINN. RULES, PART 7812.17, SUBP. 21, In re Petition of Sprint Communications Co. L.P. for Arbitration of an Interconnection Agreement with U S WEST Communications, Inc. Pursuant to 47 U.S.C. § 252(b), Docket No. P-466, 421/M-00-33 (June 27, 2000); ORDER ACCEPTING SETTLEMENT AGREEMENTS AND APPROVING MERGER SUBJECT TO CONDITIONS, In re Merger of the Parent Corporations of Qwest Communications Corp, LCI International Telecom Corp, USLD Communications Inc., Phoenix Communications, Inc., Docket No. P-3009 et al/PA-99-1192 (June 28, 2000); ORDER APPROVING SETTLEMENT, In re Complaint of MCImetroAccess Transmission Services Against U S WEST Communications for Anti-Competitive Conduct, Docket No. P-421/C-97-1348 (September 18, 2000); ORDER APPROVING SETTLEMENT, REQUIRING RELEASE OF FIBERS, FIBER CONNECTIVITY, AND COORIDOR PROVISIONING, In re Complaint of Desktop Media Against Qwest Corporation, Docket No. P-421/C-01-235 (July 5, 2001); ORDER ADOPTING TERMS AND CONDITIONS FOR PROVISIONING OF LINE SHARING IN MINNESOTA AND INITIATING COST PROCEEDING, In re Commission Initiated Investigation into the Practices of Incumbent Local Exchange Companies Regarding Shared Line Access, Docket No. P-999/CI-99-678 (December 3, 1999); ORDER SETTING PRICES FOR UNBUNDLED NETWORK ELEMENTS, In re Commission Initiated Investigation into U S WEST Communication, Inc.'s Costs Related to the Provision of Line Sharing, Docket No. P-5692 et al/CI-99-1665 (July 24, 2001); ORDER ON RECONSIDERATION, In re Implementing the Geographic Devaveraging Requirements of 47 C.F.R. §51.507(f), Docket No. P-999/CI-99-776 (December 11, 2001); ORDER APPROVING SETTLEMENT, In re Complaint By Dakota Telecom, Inc. Against Qwest Corporation, Docket No. P-421/C-00-373 (July 25, 2001); ORDER ACCEPTING THE PROPOSED RESOLUTION, In re Further Commission Investigation of Avoided Discount of U S WEST Communications (now Qwest), Docket No. P-999/CI-99-776 (December 11, 2001); ORDER REJECTING LOCAL SERVICE FREEZE OPTION AND REQUIRING THE COMPANY TO STOP OFFERING IT AT THIS TIME, In re Qwest Proposal to Offer Local Service Freeze Protection, P-421/CI-02-75 (May 7, 2002); ORDER ACCEPTING AND ADOPTING ALJ'S REPORT WITH TWO MODIFICATIONS, In re Complaint of AT&T Communications of the Midwest, Inc. Against Qwest Corporation, Docket No. P-421/C-01-391 (June 18, 2001); ORDER ASSESSING PENALTIES, Complaint of AT&T Communications of the Midwest, Inc. Against Qwest Corporation, Docket No. P-421/C-01-391 (June 18, 2001); ORDER RESOLVING COMPLAINT, SETTING COLLOCATION PRICES, AND SETTING PROCEDURAL SCHEDULE, In Re Onvoy, Inc's Complaint Against Qwest and Request for Expedited Hearing, Docket No. P-421/C-01-1896 (July 3, 2002). This list is by no means exhaustive of the proceedings that have taken place in Minnesota to implement the local competition provisions of the Act.

One of the primary purposes of the Telecommunications Act of 1996 was to promote telecommunications competition throughout the country. The Telecommunications Act of 1996 was captioned as an "Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[5] The Senate Commerce Committeee Conference Report accompanying the Act stated that the purposes of the bill are to revise the Communications Act of 1934 to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans *by opening all telecommunications markets to competition*.[6] (Emphasis supplied).

Congress intended to spur competition by requiring and encouraging the RBOCs to provide wholesale telecommunications services. Two key ways in which Congress hoped to promote the provision of wholesale services are through requirements which would (i) encourage competitors to "resell" telecommunications services; and (ii) encourage competitors to provide facilities-based competition by requiring incumbent telephone companies to "unbundle" the components of their telecommunications networks and make them available for the use of competitors at a price based on forward-looking costs.

In Minnesota, incumbent local telephone companies have been resistant to opening their networks for the use of their competitors.[7] Minnesota has aggressively enforced the 1996 Act. We are making progress, albeit slow. This is to be expected when trying to transform a government-protected monopoly into a competitive industry. Below are competitive penetration statistics for Minnesota for the past three years:

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[5] See Telecommunications Act of 1996, Publ. L. No. 104-104, 110 Stat. 56 (1996).
[6] S Report No. 104-230, 104th Cong.
[7] See fn. 4, *infra*.

COMPETITIVE PENETRATION IN MINNESOTA[8]		
1999	**2000**	**2001**
6%	10%	14% (preliminary estimate)

Given the time, money, and sweat that has gone into making the Act work for Minnesota, the MDOC cannot help but read the FCC's recent series of proposed rules with frustrated confusion. Instead of carrying out the will of Congress to promote competitive entry and reduce barriers to entry, the FCC's proposed rules, despite recitations to the contrary, seem to reflect a deliberate policy shift which would undo the six years of work that has gone into the Act, and seriously undermine the Act's effective power going forward. The tentative conclusions in the NPRM would erect new regulatory barriers to competition based on the empty promises of RBOCs to accelerate deployment of advanced telecommunications services pursuant to section 706 of the Act. The NPRM also espouses a questionable absolute policy preference for "facilities-based" investment.

The FCC's proposed rules invent a tension between sections 251 and 252, and section 706. The need to "balance" these provisions is certainly not derived from anything in the language of the Telecommunications Act, and the FCC's proposed rules fail to describe why these provisions necessarily conflict. The FCC's section 706 justification for resurrecting barriers to local competition is not based in statute, nor supported by the record that has so far developed in this docket. The FCC's tentative conclusions come long before the Bell-era barriers to entry have been completely torn down as envisioned by the Telecommunications Act of 1996. The MDOC respectfully submits that the wrong questions are being asked, at the wrong time. More disturbingly, the MDOC believes the FCC is coming up with the wrong answers.

[8] These statistics are based on annual report data submitted to the Minnesota Department of Commerce by incumbent local exchange carriers and competitive local exchange carriers operating in the state.

If aggressively enforced, MDOC is confident the current rules will work to accomplish the goals of both section 251 and 252, as well as the goals of section 706. The FCC should drop its effort to change the rules of the game, and focus its efforts on bolstering and defending its *UNE Remand Order*.

II. THE NECESSARY AND IMPAIR STANDARD.

In *AT&T Corp. v. Iowa Utility Board*, the United States Supreme Court found the FCC erred because it had really developed no standard at all.[9] The FCC revisited the issue, specifically took into account the existence of competitive alternatives to UNEs in the marketplace, as directed by the Court, and issued its *UNE Remand Order*.[10] The D.C. Circuit Court's decision in *United States Telephone Ass'n v. FCC*, a remarkable departure from *Chevron* deference to the expertise of a specialized administrative agency, does not fault the FCC for the lack of a standard. Rather, the Circuit Court substituted its own policy judgments for those of the FCC. The Circuit Court faulted the FCC for promulgating an "undiffentiated national rule" although the court failed to cite any legal authority which prohibits rules of national applicability.

The Circuit Court also faulted the FCC for not taking into account the effect of existing universal service policy in its impairment analysis, despite the lack of any statutory requirement that it do so. In addition to this unusual judicial intrusion into local competition and universal service policy, the court failed to recognize that universal service reform is one of the key prongs of the Act's trilogy of reforms designed to promote universal service and promote local competition. While many of those reforms may not yet be fully implemented, the court erred in making its own judgment about the state of universal service policy in

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[9] *AT&T Corp. v. Iowa Utilities Bd. 525 U.S. 366, 390 (2002).* The Court wrote, "We cannot avoid the conclusion that, if Congress had wanted to give blanket access to incumbents' networks on a basis as unrestricted as the scheme the Commission has come up with, it would not have included §251(d)(2) in the statute at all. It would simply have said (as the Commission in effect has) that whatever requested element can be provided must be provided."

[10] *UNE Remand Order* at ¶55.

this country, unsupported in the local competition order record, and by constraining the FCC's impairment analysis within the court's judicially constructed marketplace. Even if the court's vision of the state of the market is accurate, the court did not explain why a century of government guarantied rates of return and subsidies, which exclusively benefited RBOCs, did not also weigh into the court's "level playing field" analysis. Perhaps the manner in which the federal government allocated wireless spectrum space prior to the 1996 Act should also be considered in determining whether competitors had the same access to competing alternative technologies as did the RBOCs. Indeed, the list of historical inequities which could theoretically factor into the Circuit Court's suggested impairment analysis is infinite. Fortunately, Congress did not require such a tangential analysis. The FCC rightfully limited its focus on establishing a threshold degree of physical and economic impairment to network elements as a basis for determining whether an element is a UNE. This was a judgment entirely within the discretion of the FCC.

Nonetheless, the FCC has two strikes against it on the issue of unbundled network elements. The MDOC suggests that rather than rewriting the current standard, that the FCC focus on the development of an exhaustive and well-tested evidentiary record to support the current standard. The mere solicitation of "fact reports" from the industry's heavyweights as a basis for a record of what constitutes "impairment" will not result in a new local competition order that carries out the will of Congress. The FCC should *actively* seek out evidence from those carriers who have succeeded in competing in local RBOC markets, those who have not, and those who are just entering, in addition to those who are well-established players. There are voices missing from this debate. The voices missing are the carriers struggling to enter markets today or thinking about entering markets today; the entrepreneurs of the industry. What does impairment mean from their perspective? The MDOC submits that the FCC does not know the answer to this question, and will not know unless it steps outside the Beltway to seek answers. It must understand the industry from the perspective of a new entrant before it

rewrites its local competition rules. Otherwise, it may be prematurely pulling up the ladder on future generations of entrepreneurs.

The mere existence of competitive alternatives for elements is not enough to take an element off the FCC's UNE list. The FCC properly considered economic impairment in its analysis. Contrary to the Circuit Court's decision in *United States Telephone Ass'n*, vast disparities in economies of scale are an entirely appropriate factor for the FCC to have considered in shaping its "impairment" analysis. The court criticizes the FCC's reasoning on the basis that economies of scale are a challenge to a new entrant in any market. The court fails to consider that not we're not dealing with a question of entry into an existing competitive market. The point of the Act was to promote competition by lowering barriers to entry to a monopoly market. The court would compare entry into a monopoly phone market to opening a new hamburger stand. The FCC's recognition of disparities in purchasing power is entirely within the mandate of Congress to lower barriers to entry in local phone markets. The court's directive for the FCC to analyze economies of scale "over the entire extent of the market" is not meaningful or helpful instruction.

The FCC's proposed notice questioned whether the "at a minimum" language of section 251(d)(2) precludes the Commission from considering other factors in determining the list of UNEs. The FCC asks whether time limits should be placed on access to UNEs. MDOC questions why the FCC is asking these questions at this time. Why require a higher standard for determining UNEs than what is statutorily mandated? Why make it more difficult for new competitors to enter the market, especially now when capital markets are so difficult? The FCC's NPRM, and the RBOCs who have already commented offer the following reasons for moving in this direction.

A. Broadband deployment. The FCC assumes and the RBOCs argue that reduced unbundling requirements will result in more broadband deployment. Other than the threats of the RBOCs to continue slow rolling investment in this country unless unbundling

requirements are lessened or eliminated, there has yet to be shown a correlation of any kind that an inverse relationship exists between the diminishing of unbundling requirements on RBOCs and the acceleration of broadband deployment. In Minnesota, DSL deployment has climbed steadily over the past three years:

DSL DEPLOYMENT IN MINNESOTA (Percentage of exchanges in Minnesota where DSL is available)		
1999	**2000**	**2001**
16%	35%	45%

The areas where DSL deployment has been a problem have been in Qwest's more rural exchanges – exchanges Qwest tried to divest itself of two years ago.[11] The RBOCs promise of broadband deployment to rural areas in exchange for reduced unbundling requirements is hollow. RBOCs hold out the promise of broadband deployment while they extract reductions in unbundling requirements. Contrary to the claims of RBOCs, promoting competition in the market for advanced services is the best way to ensure those services are deployed and provided to consumers at reasonable rates and with adequate service quality. In Minnesota, rural areas have been the most neglected by Qwest. Rural areas are also the least likely service areas where Qwest is likely to be threatened by competitive entry. RBOCs seek the continuation of the government-protected monopoly market extended to the provision of advanced telecommunications services. In exchange they agree to provide service. This is classic monopolistic restriction of output. This is directly contrary to congressional intent that all telecommunications markets should be open to competition.[12]

[11] *See* INITIAL APPLICATION, In re Joint Application of Qwest Corporation, Citizens Telecommunications Company of Minnesota, and Citizens Communications Company for Approval of Transfer of Property and Authority, P421/AM-99-552 (November 16, 2002).

[12] *See* fn. 6, *infra*.

The FCC's NPRM also fails to consider alternative strategies for accelerating the deployment of broadband such as through universal service policy, local government initiatives, tax incentives, or through the promotion of alternative facilities-based technologies. The FCC's focus on promoting RBOC deployment of broadband in exchange for reduced unbundling obligations, rather than looking to whether the promotion of competing technologies can achieve this goal, is an analysis that seems inconsistent compared to the FCC's focus on promoting facilities-based investment as a justification for reducing unbundling obligations.

B. Facilities Investment. The FCC's NPRM asks whether limitations on unbundling will encourage greater facilities investment by CLECs. Of course, the RBOCs say that it will, and that more facilities-based investment is always a good thing. The FCC asks whether decreased dependence on facilities-based competition correlates to more sustainable competition. The RBOCs of course answer that it does. The MDOC has no "fact reports" or hired expert testimony to argue this point one way or the other. However, before the FCC takes any action, it should consider what has happened in the long distance industry before it sets new policy encouraging unnecessary facilities-based investment.[13]

The same "facilities-based" mantra has backfired on long distance competition policy. What has resulted is over-investment, a glut of capacity, business failures and stranded investment which MDOC believes has been the single largest factor contributing to the fall of the telecommunications industry as a whole over the last eighteen months.

[13] The Department concurs with the comments of Eschelon Telecommunications that the Act sought to avoid socially wasteful investment in pointless facilities duplication. Comments of Eschelon Telecom, Inc. at 3.

C. "Intermodal" competition. The FCC's NPRM and the Circuit Court in *United States Telephone Ass'n* both raise the question of whether the existence of intermodal competition affects the impairment analysis. The MDOC's limited review of the record in this docket to date, and its observations of the marketplace lead it to conclude that the deployment of technologies which bypass RBOC networks have not resulted in the emergence of alternative market for wholesale telecommunications services.

Moreover, there are minimal legal requirements forcing intermodal competitors to provide access to their networks. Congress placed special obligations on RBOCs in this regard. If alternative wholesale markets have emerged, they are not readily apparent, and have not been demonstrated to exist in the comments filed to date in this docket. The presence of "intermodal competition" should not be a justification for the reduction of unbundling obligations.

III. THE ROLE OF STATE COMMISSIONS

States have played a critical role in the implementation and enforcement of the 1996 Act. Whatever the Commission does, it should not attempt to upset the ability of states to impose their own unbundling requirements. Not only would this be bad policy, but such action is outside the FCC's authority under 47 U.S.C. section 251(d)(3). That section prohibits the FCC from preempting the enforcement of any regulation, order, or policy of a state commission establishing access and interconnection obligations for local exchange carriers. As long as a state commission's action is consistent with section 251 and does not "substantially prevent" implementation of the requirements of section 251 and the purposes of the Act, the FCC is prohibited from interfering with such actions. Any attempt by the FCC to establish a prospective order preempting state commissions from independently establishing a list of unbundled network elements applying its own necessary and impair analysis would violate section 251(d)(3).

That said, the MDOC continues to favor the promulgation of federal rules for unbundling. The FCC asks in its NPRM whether states are better suited to tailor unbundling obligations suited to local market conditions. The MDOC would say that state commissions are better suited to perform this task, but this fact does not preclude the FCC from working with states to develop a national list of unbundled network elements. The FCC questions whether states have the resources to conduct such an investigation. In Minnesota, we do have the resources. However, MDOC challenges the FCC to dedicate the resources to work individually with states to develop a record to support a national list of UNEs. It can be done and should be done.

This task should be done in a manner as far removed from Beltway politics as possible. MDOC recommends that the FCC establish a liaison from its Local Competition Bureau with every state commission in the country, and participate in individual state proceedings on the subject of local competition and UNEs. The FCC should then use the records from these state proceedings as the basis for its own national list of UNEs. Some states may wish to collaborate in this process. Such a process would ensure the greatest amount of access to all carriers, large and small, and give the FCC a perspective it sorely needs. This would be a major initiative, but is far preferable to the paper and lobbying wars that too often appear (at least to Beltway outsiders like the MDOC) to characterize the FCC's fact finding processes. Such cooperation between the FCC and States would be unprecedented.

IV. CONCLUSION

The Circuit Court's decision in *United States Telephone Ass'n v. FCC* places the FCC and interested parties in a very awkward position. An appeal of that decision to the United States Supreme Court might result in a reversal of the Circuit Court's decision, which would please the MDOC. MDOC's first preference would be for the current list of UNEs

to be maintained (including line sharing), and for the FCC to drop its inquiry into changing the ground rules for competition.

However, based on the FCC's NPRM, it appears the FCC itself is questioning its *UNE Remand Order* and considering changes the rules to reduce unbundling obligations for RBOCs. Moreover, the FCC has been directed to reconsider its UNE remand order by the D.C. Circuit Court. The FCC could lose on appeal, as it did the first time, and be back at square one a year from now. Given these circumstances, the MDOC recommends that the FCC focus its efforts on development of an exhaustive record to support a national list of unbundled network elements. The FCC should work directly with states for the development of this record. The Circuit Court stayed the effectiveness of the FCC's UNE remand order. The FCC's current list of UNEs should be maintained until this new record has been developed.